EXHIBIT K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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In re: BERNARD L. MADOFF 10 CV 4652 (JGK)
10 CV 7101 (JGK)
10 CV 7210 (JGK)
10 CV 1298 (JGK)
10 CV 1328 (JGK)
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New York, N.Y.
December 19, 2011
11:00 a.m.

Before:

HON. JOHN G. KOELTL,

District Judge

APPEARANCES

BEASLEY HAUSER KRAMER & GALARDI
Attorneys for Adele Fox
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DAVID SHEEHAN

HEMANT SHARMA
Securities Investor Protection Corporation

(Case called)

(In open court)

THE DEPUTY CLERK: This is the case of In Re: Bernard L. Madoff. All parties please state your appearance for the record.

MS. CHAITMAN: Helen Chaitman, Becker & Poliakoff, on behalf of Susanne Story Marshall.

MR. BEASLEY: Good morning, your Honor. I'm Jim Beasley here on behalf of the Fox class. With me is my partner Joe Galardi and my colleague, Rick Stone.

THE COURT: Thank you.

MR. MAY: Good morning, your Honor. Lawrence May, Cole, Schotz, also on behalf of the Fox class.

MR. SHEEHAN: Good morning, your Honor. David Sheehan on behalf of the trustee Picard.

MR. SHARMA: Hemant Sharma on behalf of the Securities Investor Protection Corporation.

THE COURT: Good morning. All right. How much time do you parties want? I've read the papers. I'm familiar with the argument.

MR. BEASLEY: If your Honor please, I would suggest approximately 40 minutes per side.

THE COURT: No.

MR. BEASLEY: 30 minutes per side. Whatever your honor please.

THE COURT: About 25 minutes a side. It's about twice as long as the Court of Appeals.

MR. BEASLEY: Thank you. I understand.

THE COURT: Okay. I'll listen to the appellants first.

MS. CHAITMAN: Excuse me, your Honor, just when you say 25 minutes, are you saying for both appellants?

THE COURT: Yes. 25 minutes for the appellants, 25 minutes for the appellees.

MR. BEASLEY: May it please the Court. I'd like to reserve ten minutes for rebuttal, your Honor.

THE COURT: Sure.

MR. BEASLEY: There are basically two issues before the Court today. First of all, should the Fox class be permanently barred from pursuing their claims against Picower. Second, should the trustee be allowed to retain a $5 billion settlement with Picower, even though he only has a proper claim for $250 million where there was no jurisdiction to approve the settlement. We submit, your Honor, the answer to both of those questions is no, and that the order of the Bankruptcy Court should be reversed.

A brief statement about the facts. The trustees sued Picower in May, 2009 after extensive investigation. The trustee only sued for fraudulent transfer claims under the bankruptcy code. In February, 2010, the Fox class brought an

action in Florida in the Southern District, all the claims were under state law. These are the claims that the Bankruptcy Court held belonged to the trustee. The Fox class made no claim against the estate.

The Fox class consists of approximately --

THE COURT: Let me stop you -- go ahead.

MR. BEASLEY: The Fox class consists of about 3,000 victims of the ponzi scheme who were held to have no net equity and therefore they have no claim against the estate. The trustee has determined --

THE COURT: Let me stop you. With respect to the claims that you brought in Florida, the claims were the same, based on the same facts that the trustee had alleged in the fraudulent transfer claims, right?

MR. BEASLEY: That is correct, your Honor. Basically the same basic facts, that there was a Madoff ponzi scheme.

THE COURT: But it was a cut and paste of the trustee's complaint, except for the names of the causes of action and the damages sought.

MR. BEASLEY: We relied substantially on the trustee's complaint against Picower and the subsequent material that was filed in court.

THE COURT: Same facts?

MR. BEASLEY: Essentially. Essentially.

THE COURT: You keep hedging.

MR. BEASLEY: Well, because they're not identical, your Honor. I don't mean to quibble at all. Let's assume they are substantially the same facts, I suggest.

THE COURT: Putting aside the issue of the Wagoner Rule, could the trustee have brought -- could Madoff Securities have brought the claims that you brought in Florida?

MR. BEASLEY: Absolutely not, your Honor. That's the crux of our position.

THE COURT: Why not?

MR. BEASLEY: Why not? Because the trustee has no standing to assert those common law --

THE COURT: No, I said could Madoff Securities have done that, putting aside the Wagoner Rule. The trustee succeeds to any claims by Madoff Securities, and my question is, could Madoff Securities have brought those claims?

MR. BEASLEY: Absolutely not, your Honor.

THE COURT: Why is that?

MR. BEASLEY: That's because of the in pari delicto rule.

THE COURT: That's the Wagoner rule?

MR. BEASLEY: The Wagoner rule doesn't really say in pari delicto. In pari delicto is a state law defense. But because two people who commit a fraud, one cannot sue the other. It's as simple as that.

THE COURT: Has the Wagoner rule ever been applied to

foreclose a trustee from bringing a claim based on the defense to a lawsuit that it had not brought? In other words, usually the in pari delicto defense comes up with the trustee, on behalf of the debtor sues a person who is in pari delicto. And the person who is in pari delicto says can't sue me, in pari delicto. Has it ever been applied, as you seek to apply it in this case, to prevent the effectuation of an injunction based on a lawsuit that the trustee itself has not brought?

MR. BEASLEY: The trustee is claiming that all the claims asserted by Fox belong to him. Our response to that is the position that you have articulated, and I do not believe that there is any case that supports the trustee's position. The Wagoner --

THE COURT: But unlike the usual in pari delicto or Wagoner situation, there's no one here like Picower to say, hey, you can't sue me because you're in pari delicto. So my only question is, is there any case that's applied either in pari delicto or Wagoner as you seek to apply it here?

MR. BEASLEY: I am more familiar with the converse, that there's no position to support the trustee's estate. It's not really --

THE COURT: Okay, okay, so --

MR. BEASLEY: It really doesn't matter --

THE COURT: Okay.

MR. BEASLEY: Because it's an issue of standing and

subject matter jurisdiction. It's not a matter of who can assert the affirmative defense.

THE COURT: Okay. There's a real question of whether it's subject matter jurisdiction or not, but put that aside. You don't think that there's any case going either way on this subject. There's no case that supports you and there's no case that supports the trustee. I'm writing on a clean slate. Yes?

MR. BEASLEY: I think the slate isn't quite clean because I think the cases that do exist all support our proposition. Is there a case precisely on these facts, I cannot tell you that today, this morning.

THE COURT: And the only reason that Madoff Securities could not have brought the Florida claims is because of in pari delicto or the Wagoner rule.

MR. BEASLEY: Well, it's two issues. Number one, it's the Wagoner rule and number two, it's the Johns Mansville rule, so there's two independent bases for asserting that the trustee can't possibly own the claims that were asserted by Fox.

THE COURT: The Johns Mansville rule is different. The claims were plainly independent claims in Johns Mansville and one of the issues here is whether the claims are in fact independent claims. So it sort of begs the question to say that these claims would have been precluded based on Johns Mansville. But the two reasons you say that the trustee could not have brought these claims is Wagoner or in pari delicto and

Johns Mansville.

MR. BEASLEY: That is correct, your Honor. Those two basic -- those are the two basic bedrock principles, and I will add that there's been no one in this case that has denied that the Fox class has suffered an independent injury. The Fox class claims are for things like improper income taxes paid that could not possibly have been sustained by the debtor.

THE COURT: And lost profits, right?

MR. BEASLEY: No, not any claim for lost profit whatsoever.

THE COURT: The income it would have made had they had the money?

MR. BEASLEY: No, your Honor. It's essentially, what we're saying is we're entitled to prejudgment interest. We're entitled to compensation for the time value of money. Prejudgment interest is our damage model.

THE COURT: Okay. If you had been successful in your claims as to what your recovery should have been in the bankruptcy, had the bankruptcy trustee come out the other way and the Second Circuit come out the other way on the net equity issue, would you have had any claims in Florida?

MR. BEASLEY: The claims in Florida are for damages that they suffered apart from -- well, go back -- just rewind, if you want to rewind entirely, the claim initially was that people wanted the amount of money that was shown their last

statement from the Madoff firm and they sought that amount of money, that was the bedrock claim and that has been rejected.

THE COURT: Right, but my --

MR. BEASLEY: Under the net equity rule, which we do not quarrel with --

THE COURT: My question is, the claims that you brought in Florida under state law, would those claims exist if you had succeeded in your argument on the net equity rule?

MR. BEASLEY: Yes, your Honor. I think they would, because the issue of whether or not, which I think is hypothetical at this point, whether or not every investor in Madoff was entitled to collect the total of the 64 to $68 million that was shown on the last statements to the investors in the Madoff ponzi scheme would still not go to the issue of our claims for payment of income taxes on fraudulent or phony investment income.

THE COURT: How do your -- okay. How do your claims differ in Florida from the claims of all other customers or shareholders of Madoff Securities, all of whom could make the argument that they had to pay taxes on the profits as they came in over the years?

MR. BEASLEY: Well, the distinction today, your Honor, is that the trustee has declared that the so-called net losers are entitled to recover from the estate, whereas the Fox class has no such entitlement. So that's the real world answer I

think to your Honor's question.

THE COURT: So the real world answer as to why you have a claim or claim to have a claim in Florida is because you lost the net equity decision.

MR. BEASLEY: We never ourselves asserted that, others did, we did not.

THE COURT: Because --

MR. BEASLEY: But yes, this decision is now etched in stone as far as we're concerned.

THE COURT: And the only reason you claim that you have a claim in Florida is that you were the -- you came out on the wrong end of the net equity decision.

MR. BEASLEY: Well, having been declared not to have any claim against the estate and knowing that the Fox class did suffer real damages and no one has disputed that, we look to others against whom the Fox class might recover, and Picower was certainly one of those, and so we brought our claims against Picower to recover damages that were suffered by the Fox class for injuries for which there would be no compensation whatsoever in the bankruptcy proceeding.

THE COURT: Why isn't the trustee right, then, that the lawsuits in Florida are an end run around the net equity decision, because the only distinction that you claim and the only distinctive damages that you're claiming in Florida are based on being on the short end of the net equity decision by

the Bankruptcy Court in the Second Circuit?

MR. BEASLEY: That decision simply means we have no claim against the estate. Whether we have a claim against Picower is the issue of the day as far as we are concerned, your Honor, most respectfully. The question is whether we have a claim against Picower for damages that we clearly suffered. We are not doing an end run around the net equity rule because we're not seeking the investment losses that were sustained when someone got a statement from Madoff for $3 million and it turns out not to exist. We're not seeking that 3 million.

THE COURT: But you're claiming taxes that you had to pay on the profits. It was a lawsuit which you say, if I understand you right, could have been brought by any of the investors or customers in Madoff Securities except the customers you say who have been paid and not fully paid, but don't have the same claim, so it's the losers in the net equity who you say have this claim, right?

MR. BEASLEY: It's because we have no claim against the estate that we brought our claims against Picower. We didn't sue the estate, we didn't make a net equity claim. We made claims for common law causes of action that could not possibly have been brought by the trustee, and therefore, there was no subject matter jurisdiction in the Bankruptcy Court.

THE COURT: Let me just, one last time to be sure that I understand. Could all of the customers of Madoff Securities

have brought the same claims that you brought in Florida against the Picower Defendants?

MR. BEASLEY: I don't think so, your Honor, because they're going to be made whole. If there are sufficient assets in the estate, they're going to be made whole. They have a priority under SIPA to the bankruptcy estate. If they're going to be made whole, I assume it's going to be made whole for whatever losses they suffer; investment losses, tax losses, whatever.

THE COURT: So the cases that say if there is a claim which is common to all of the creditors, that is a claim to be brought by the trustee, those cases you say don't apply because as a result of the net equity rule all of the creditors are not in the same situation. Some have been favored by the net equity rule.

MR. BEASLEY: That is precisely correct, your Honor, and that's exactly the way Judge McMahon analyzed it.

THE COURT: And that would then lead to the question of whether this isn't an end run around the net equity rule.

MR. BEASLEY: Well, it isn't an end run around the net equity rule. The net equity rule creates the problem, but we don't question it, we don't question the net equity rule, and the net equity rule means there are, the class of victims, investors we'll call them, is now divided into at least two parts.

THE COURT: The haves and the have-nots.

MR. BEASLEY: Ones that will recover against the estate and ones that will not, and if our class is not allowed to pursue these claims against Picower, they will actually recover absolutely nothing. And so we have 3,000 people with claims of several billion dollars, we calculate, who will receive absolutely nothing. The trustee has taken upon himself to, having denied the Fox class any recovery in the estate, which we don't quarrel with, it's a proper decision, he's taken upon himself for two years to prevent the Fox class from seeking recovery for their damages against the Picowers. We haven't been litigating against Picower, we've been litigating against the trustee. I don't think Picower has filed a single paper in any of these cases ever. It's simply the trustee trying to protect Picower and extinguish our claims as a bargaining chip in the settlement that he has reached with Picower.

THE COURT: There's no question that the Picower defendants were not in privity with the Florida plaintiffs. Is there any claim that the Picower defendants had any independent duty to the Florida plaintiffs?

MR. BEASLEY: Your Honor, there is no requirement for privity or a duty based on the very claims that we have asserted. We did not assert any kind of fraud claims, we asserted claims for conversion, unjust enrichment --

THE COURT: And Florida civil RICO.

MR. BEASLEY: And none of those require privity or reliance or a relationship.

THE COURT: And you don't allege any independent duty by the Picower defendants.

MR. BEASLEY: We do not allege any because there weren't any. It's not a requirement of the elements of our causes of action.

THE COURT: Doesn't that distinguish this case from Travelers where the very essence of the claims were independent claims by people who allegedly had direct actions against Travelers for what Travelers did to them?

MR. BEASLEY: Your Honor, I submit that there is no case that requires privity or a duty under Johns Mansville. Johns Mansville happened to be a case involving a fraudulent misrepresentation which obviously had to be made directly to one of the claimants, but it does not say that Johns Mansville, does not say that privity is a requirement and it would be odd to do that when the very claims that we are asserting do not have privity or any of these other relationships as an element of the causes of action.

THE COURT: Okay. Do you want to finish up?

MR. BEASLEY: I guess I should, your Honor. We submit that under the Wagoner rule and under Johns Mansville the Fox claims do not belong to the trustee. These injuries were not

suffered by the estate or by Madoff prior to the bankruptcy. Therefore, the trustee does not own these claims and therefore the Bankruptcy Court had no jurisdiction whatsoever to enter into the settlement that they entered into with the Picowers. There was no jurisdiction to approval the settlement because of the first injunction. The notice of appeal divested the lower Court of jurisdiction to address the aspects of the case that are involved in this appeal.

The settlement agreement and the injunction in the settlement are completely intertwined. For example, the trustee's motion before the bankruptcy said an injunction was part of the settlement, and in their reply brief in this appeal they said the permanent injunction was material and necessary. It would have prevented settlement from going forward. And so in the trustee's motion to the Bankruptcy Court they cited the first injunction at least seven times and argued extensively that the second injunction, which is the one on appeal from the, we'll call it the second appeal, should be approved on the authority of the first.

So we believe that the Bankruptcy Court has no jurisdiction to enter into the settlement and the second injunction. It had no subject matter jurisdiction as we've already discussed under Wagoner and Johns Mansville and finally, the release of a non-debtor is improper. A permanent injunction against a non-creditor is simply improper. When a

third party gets sued by a trustee and a third party wants to settle, the third party often asks that the settlement include an injunction, a full release of all claims. Courts uniformly reject those settlements. The clearest case is Johns Mansville itself. Secondly, the Zale case in the Fifth Circuit in 1995 which is cited in Johns Mansville. The trustee has cited no case where such a settlement containing such an injunction was upheld. Thank you.

MS. CHAITMAN: Your Honor, I think you can hear me from here, can't you?

THE COURT: I think it might be helpful, if you don't mind.

MS. CHAITMAN: I'll be brief, your Honor.

THE COURT: Thank you Ms. Chaitman.

MS. CHAITMAN: I want to save some time for rebuttal. I would answer differently the questions that you asked my colleague. If you look at the decision of Judge Rakoff in the HSBC case or the decision of Judge McMahon in the JPMorgan Chase case, you will see that Mr. Picard sought to see those financial institutions on behalf of all of the investors, and both judges held that he lacked standing to do so. He lacked it under SIPA, not only under the Wagoner rule but also he had no standing to assert claims that belonged to the investors. And here I would say, your Honor, that every single Madoff investor --

THE COURT: But weren't those based on in pari delicto?

MS. CHAITMAN: No. There were several bases in the decision, your Honor. They said Picard was barred under the Wagoner rule, he was barred under SIPA. SIPA did not give him the standing to assert claims that belonged to the investors and SIPA did not give him the standing to assert common law state law claims. That's spelled out in the decisions, in both of them.

THE COURT: All right.

MS. CHAITMAN: And it's based on existing authority, your Honor. Neither Court did anything that was unpredictable.

I would answer differently from Mr. Beasley your question as to which of the Madoff victims have a claim against the Picower parties. I would say that every single one of them has a claim. I think you have to distinguish between whether someone has a claim and whether they can prove damages. Now, it may be --

THE COURT: So could I just stop you? Unlike Mr. Beasley, you would say that the Florida claims are shared by all of the customers of Madoff Securities?

MS. CHAITMAN: Yes, absolutely. Because every single customer -- if two people steal my wallet, I have a claim against each of them for conversion.

THE COURT: Okay.

MS. CHAITMAN: And if one of them pays me back, then I can't prove damages against the other one.

THE COURT: But if that's right, then, the question is there are cases that stand for the proposition that if a claim is shared by all of the creditors of the debtor, then the trustee is the proper party to bring that claim.

MS. CHAITMAN: Those cases are contradicted by the decisions of Judge Rakoff and Judge McMahon, and I think that they are not good law, your Honor, because --

THE COURT: There is a -- some of them are Second Circuit law, which is more --

MS. CHAITMAN: More controlling?

THE COURT: More persuasive than our decisions.

MS. CHAITMAN: I understand that, your Honor. But the point is that it may be that there are people who have claims against BLMIS who will be paid in full. Those people do not --

THE COURT: But as you say, that's a difference that goes to damages and not to whether the claim exists. It goes to the amount of the claim rather than the claim.

MS. CHAITMAN: Yes. Because I think all of this has to be viewed in the context of what the jurisdiction, what standing the trustee has and what jurisdiction the Bankruptcy Court has, and I think one of the things that makes an enormous difference for your Honor is that we now are dealing with the law as announced by the United States Supreme Court in Stern v.

Marshall, which essentially divests the Bankruptcy Court of jurisdiction over this adversary proceeding in the first instance. So here we have a situation where the Bankruptcy Court entered an order approving a settlement in a case in which it didn't have jurisdiction, and then in that settlement, even though the settlement was not contingent upon an injunction, the Court entered an injunction enjoining third parties over whom the Court did not have jurisdiction.

THE COURT: It plainly, it plainly had the jurisdiction over the fraudulent conveyance claims that it brought, and it plainly had jurisdiction to settle those claims. It plainly had jurisdiction to issue certain injunctions. It's not like Stern v. Marshall. The question then becomes what the appropriate scope of the injunction was, and whether the injunction in furtherance of the settlement went too far. But it plainly is not a Stern v. Marshall case.

MS. CHAITMAN: I would respectfully disagree, your Honor, because Stern v. Marshall cited the Granfinanciera case and Granfinanciera was a fraudulent transfer action. I think Stern v. Marshall reaches fraudulent transfer action.

THE COURT: You think Stern v. Marshall held that a Bankruptcy Court is without jurisdiction over a fraudulent conveyance action?

MS. CHAITMAN: Yes, I do, your Honor. If you look at the decision and look a t the citation in Granfinanciera, I

think that's true. I think the Court did not have jurisdiction over this case. Now, clearly, the Picower parties didn't raise that, but you can't confer subject matter jurisdiction by consent.

THE COURT: I understand.

MS. CHAITMAN: So I think we're in a situation where the Bankruptcy Court did not have jurisdiction over the lawsuit to begin with, we know that in retrospect, and the Court certainly didn't have jurisdiction to enter an injunction depriving the investors of claims they had against the Picower defendants. Because in essence what the Court has done is given the Picowers the bankruptcy discharge when they didn't go through the whole bankruptcy process. They never disclosed their assets. There's just no authority for what was done here, your Honor.

THE COURT: Okay.

MS. CHAITMAN: Thank you.

THE COURT: Thank you, Ms. Chaitman.

MR. SHEEHAN: Good morning, your Honor. David Sheehan for the trustee. If I may, your Honor, just in light of the colloquy that just transpired, I'd like to if I could just return to first principles. I think what's got lost here in this colloquy is the fact, and I think your Honor focused on it, is the fact of what we're doing with a fraudulent conveyance action brought by the trustee under the bankruptcy

code for returned property to the estate and as such it falls under cases like your Honor alluded to like St. Paul's from the Second Circuit, been the law in this jurisdiction for over twenty years, which says that if you have a generalized claim, which is clearly what we have here, the fraudulent conveyance action, seeking the return of property to the estate, a claim that is not particularized but denies all the creditors, which my colleague Ms. Chaitman has conceded is the case here.

Clearly, as your Honor has stated, this Court, Judge Lifland, had jurisdiction, considered under Rule 9019 appropriately all the factors in connection with the approval of a settlement, did so, and then not seeking a directed discharge to the Picowers, but did exactly what you should do as Judge Rakoff pointed out in the St. Vincent case and that is what? Protect the orderly administration of the estate, and to protect those creditors, all of them that that trustee represents, to make sure they all get a pro rata distribution, as a benefit of that injunction to shut down all of those other causes of action so that we don't have individualized causes of action by creditors seeking generalized claims. What happens is, yes, the Picowers did indeed receive the benefit of that injunction, there's no question of that.

THE COURT: Are you referring to the first injunction?

MR. SHEEHAN: I think yes, your Honor. Because the first injunction deals with the suit at hand. The second

injunction deals with suits yet to be had, and there are those that have been filed.

THE COURT: How do you respond to Mr. Beasley's argument that there was a lack of jurisdiction to approve the settlement because the first injunction was still on appeal to me?

MR. SHEEHAN: I disagree, your Honor. I don't think one has any relationship to the other. I believe that when the injunction was entered, what it did was enjoin those actions in Florida, did not in any way affect the ongoing litigation in front of Judge Lifland which then culminated in the settlement. As part and parcel of that settlement the Court definitely had to assess the jurisdiction to consider the entry of a permanent injunction at that time as part of the overall settlement process and approving that order to protect the integrity of the settlement and the estate which was going to benefit from that settlement. So I think he definitely had jurisdiction at that point to enter that order.

THE COURT: Okay. I interrupted you from your argument.

MR. SHEEHAN: Your Honor, I don't need to take a lot of time. I think our papers set forth most of the answers to this. One other thing I would bring up is this: There are many references to HSBC and JPMorgan Chase. I don't think they have anything to do with this case for a couple of reasons.

First of all, we're talking about settlement here. This isn't being raised by the Picowers, it's being raised by third parties. This case is settled, it's done, they've agreed to it, approved by the Bankruptcy Court. Whether or not the trustee could or could not have brought these causes of action I don't think matters one whit to the approval of the settlement. Those are defenses that could have been raised there and they're certainly not binding --

THE COURT: No, my same question that I raised to Mr. Beasley.

MR. SHEEHAN: Sure.

THE COURT: Is there any case where the Wagoner rule or in pari delicto has been used the way in which Mr. Beasley seeks to bring it here and he says there's no case on either side. I said it usually comes up in the context of someone sued by the trustee who says you can't do that.

MR. SHEEHAN: Correct.

THE COURT: In other words, Wagoner in pari delicto, you can't sue me because you're in pari delicto, therefore, throw the case out. Here, the Picower defendants have not said you can't sue us because of Wagoner or in pari delicto, and Mr. Beasley said there's no case that deals with a situation like this.

MR. SHEEHAN: My comment on that, your Honor, would be this, this is again going back to my first principle. We're

dealing with a fraudulent conveyance. In fraudulent conveyance in pari delicto is not a defense. As simple as that. Relatively straightforward, but when you think about it, when you're suing --

THE COURT: Yes, but what Mr. Beasley would say is that the Florida actions are not fraudulent conveyance actions because they're named as state law claims, unjust enrichment, conversion, Florida, civil RICO, they're not styled as fraudulent conveyance claims, and he says the trustee could not have brought those claims because of the Wagoner rule.

MR. SHEEHAN: Independence, your Honor, but as Judge Lifland pointed out, whatever label you put on the cause of action, whether you call it a 10b-5 cause of action or whether you call it the causes of action that are alleged here is of no moment. They are indeed the same causes of action disguised. They are disguised, as it were, as Judge Lifland said as fraudulent conveyance actions. That's what they are. They are seeking to get property of the estate. There can be no other purpose served by this. As St. Paul told us, when you're doing that, that belongs to the trustee and creditors must abide by that. Creditors must empower those monies to be brought into the estate.

Otherwise, think of it, your Honor. Think of how Judge Lifland alluded to think of what would ensue if that were not the case. We would have multiple litigations all across

the country with brilliant counsel coming up with different ways to label what is essentially a fraudulent conveyance action, and at the end of the day start parsing the estate through multiple jurisdictions in federal and state courts, and the trustee is in the middle of that trying to sort that all out. Congress saw that, so did the Second Circuit, shut it down. That's exactly what Judge Lifland did here.

Thank you, your Honor.

THE COURT: Oh, before you go.

MR. SHEEHAN: Oh, sure.

THE COURT: Why was the injunction necessary in the final settlement? And what would the status of the settlement be if the injunction against any claims against the Picower defendants were not affirmed? It's a multi part question. In your papers --

MR. SHEEHAN: I'll answer both of those, your Honor, if I may.

THE COURT: All right.

MR. SHEEHAN: The first is, is that it was settled.

THE COURT: I'm sorry?

MR. SHEEHAN: It was a settlement, it was bargained for. I think as Judge Lifland pointed out, I think someone who pays this amount of money and divests themselves of every single penny of what they took out of this estate is entitled at that point to at least bargain for and ask for and that the

Court if it deems appropriate, the issuance of an injunction to accomplish not only the salutary purposes of the bankruptcy statute, but also to give those who are settling the benefit of that. So it's part of the bargain.

THE COURT: No, but be clear with me, please, on what the nature of the bargain was, because it's not clear to me --

MR. SHEEHAN: Well --

THE COURT: Hold on -- that the papers are crystal clear. It's one thing to say that as part of the bargain, we, the trustee, will ask for an injunction against any claims against you, the Picower defendants, arising from these matters. It would be another thing to say the settlement is conditioned on an injunction against third party claims. You, the Picower defendants, can walk away from this having given your $7 billion if in fact Judge Lifland doesn't enter the injunction. Those are two different things, right?

MR. SHEEHAN: That's the second half of the question which I didn't get to, your Honor, and I will in a moment. Can I add one thing to your description?

THE COURT: Sure.

MR. SHEEHAN: We're not settling any claims. I think we have a good, detailed injunction derivative in duplicate a la Dreier. I think we've written it pretty well and I think any Court where this sought to be enjoined, sought to enjoin the other parties, it's clear what we're enjoining here is not

any claim, but derivative claims of the trustee.

THE COURT: And independent claims are excepted.

MR. SHEEHAN: That's right. Getting to the second half of your question -- I'm sorry.

THE COURT: I'll get to the second half. In essence you're asking me on the first appeal to find these are not independent claims.

MR. SHEEHAN: That's right, your Honor. That's still in play, I agree with that, absolutely.

THE COURT: Okay.

MR. SHEEHAN: The second half of the question is complicated by the fact of the United States Attorney's involvement in the proceeding, because, quite frankly, without divulging any 408 discussions that took place, and there were dozens of them, it became apparent to us that the, as we were negotiating, if your Honor has read the history you know it was somewhat tortured over a period of about 15 months, at one point the United States Attorney's Office wanted to indeed, even though we had a separate settlement for $5 billion and they were forfeiting two, they wanted to forfeit it all. That made a lot of sense I think for a whole host of reasons that we don't need to get into here this morning.

Once that happened, the answer to the second question became moot. The money is no longer there. It's forfeited by the government. Once the government has that money it can't be

returned to the Picowers, it's gone. The only thing that can happen then is by virtue of the agreement we entered into with the government we get the $5 billion.

Now, there's been an appeal from that as well. As you know, Judge Griesa saw, as I think your Honor has indicated here this morning by your questioning, this was an end run around the net equity and denied the opportunity to intervene in the forfeiture proceeding. That's also on appeal. But, your Honor, in the normal course, I agree with your Honor that probably if we -- without the government's involvement the Picowers indeed would have indeed suggested it should be contingent we shouldn't pay $7 billion unless we had this guarantee, as it were. But here once the trustee became involved that changed the whole landscape.

THE COURT: So what do you do with the argument that the injunction is then unnecessary because the money is gone?

MR. SHEEHAN: It's not just an injunction in this case, your Honor. That's why we sent you Judge Hellerstein's opinion. I think Judge Hellerstein picked up on that in Apostolou and the cases he cites, what we're talking about here is an injunction and as I said at the outset, your Honor, this is an injunction that preserves the orderly liquidation and the pro rata distribution of the property of the estate. That's what we're talking about here. So it's not just this injunction. It's the Stahl injunction, it's the Maxim

injunction. We have multiple injunctions here that are all directed at efforts by third parties such as those in the courtroom here today to try to attack the estate. So it's yes, very important to us to maintain the integrity of the injunction here irrespective of what the outcome may be with respect to the money.

THE COURT: Why? Why with respect to the cases that are before me you say the Picower $7 billion is gone, it won't be returned, it can't be returned, and so the appellants say the injunction is unnecessary. The money is there, the trustee has the money, the trustee is going to distribute the 5 billion, has authority over the 2 billion. Our claims don't have to be enjoined, even if they were duplicative. Even if they were derivative. The injunction is unnecessary and therefore shouldn't be affirmed?

MR. SHEEHAN: Well, I respectfully, your Honor, disagree with that. I think that whether the money is there or not is irrelevant. I think what is important is the fact that they are derivative claims and that with the trustees in this estate and all the creditors should not be concerned about is the ability of someone to go around the country instituting litigation all over the place and interfering with the proper administration of this estate. I can't tell you how difficult it is, your Honor, with the multiple litigations that we already have that we brought in behalf of the trustee to deal

effectively with all these other parties.

THE COURT: But you would no longer be involved in this, right? It's a suit by the losers of the net equity decision suing a third party, the Picower defendants, who have already given up money to the estate, but you wouldn't -- you're not -- you wouldn't be a party to the cases in Florida.

MR. SHEEHAN: In essence, we would. Let's assume your Honor finds these are derivative, right? Which I respectfully suggest you should. All right? Well, then how do they then go about it. They can't just file a case. There's something called an automatic stay already enforced preliminarily by the judge here. Let's say they recraft their action, they say it's a 10b-5 cause of action and they file it. How can they file it without going before Judge Lifland and suggesting to him it's not derivative? So no matter what, we have to have that bar. And as a matter of fact, your Honor, when you really think about the preliminary injunction, it's just actually the judicial enforcement of a statutory directive, and that is, is that you cannot have these causes of action proliferating and we need your Honor and Judge Lifland's strong arm to make that happen.

THE COURT: But I'm talking now only about the part of the final settlement agreement that includes the permanent bar on the claims in Florida to the extent that they are derivative.

MR. SHEEHAN: Right.

THE COURT: And the question is --

MR. SHEEHAN: Yes, but I think if in fact they are derivative they should be enjoined irrespective of what happens to the money, I guess is my answer.

THE COURT: All right.

MR. SHEEHAN: Thank you, your Honor.

MR. SHARMA: Good morning, your Honor, Hemant Sharma on behalf of SiPC. I'm going to keep this very brief. I think our briefs are very thorough and hit on most of these issues. I want to make a couple of points. There are two issues before the Court. One is the order approving the settlement and requesting the issuing of the permanent injunction be appealed and the second is whether or not the claims of the appellants are derivative or duplicative. SiPC only filed a brief with respect to the order approving settlement. We didn't file a claim with respect to whether or not the claims are duplicative.

Your Honor asked a couple of questions regarding the necessity of the permanent injunction with respect to duplicative and derivative claims and I just want to reiterate the point which Mr. Sheehan made, which is that Congress set forth under SIPA an orderly distribution mechanism that favors customers of a broker dealer and if you have -- in this case Judge Lifland issued a permanent injunction in order to

exercise his jurisdiction to make sure that that mechanism is followed so you don't have, as Mr. Sheehan pointed out, a bunch of different creditors that may not have that preferred status trying to get what in this case would be customer property. Because what the puck Picowers had received, the 7.2 billion, was all customer property that were deposits made by other customers. That's the only thing I have to say, your Honor.

THE COURT: But the issue is the Picowers having given up that money, what's the necessity for the permanent injunction?

MR. SHARMA: Your Honor, I believe what the settlement agreement said was that the trustee would make best efforts to obtain a permanent injunction, but it was the Bankruptcy Court on its own volition that has the authority and the discretion to issue the permanent injunction in order to exercise their jurisdiction over in this case customer property. It was customer property that was turned over by the Picowers and I think what the Court found was that a permanent injunction was necessary to stop other parties trying to seek property that should have gone to the trustee for distribution.

THE COURT: What does that mean?

MR. SHARMA: The Picowers have $7.2 billion in fraudulent conveyance.

THE COURT: They've given it over, and it's gone.

MR. SHARMA: It's gone, but, again, it's --

THE COURT: It's gone from the Picowers.

MR. SHARMA: It's gone from the Picowers. Again, the injunction is limited to claims of the trustee. To the extent there's other independent claims, other parties, those are not property of the estate. The Court doesn't have jurisdiction over those. The Court does have jurisdiction over claims that belong to the trustee and it would be, the Court is just enforcing its jurisdiction over property that belongs to the trustee.

THE COURT: But it has that already and it doesn't need yet a further injunction except, I mean, it could determine that if it didn't issue an injunction it would be the last settlement it ever saw. If in fact the money is a settlement of a claim by the trustee and the trustee, and the Court couldn't enjoin derivative claims that otherwise belong to the trustee, what other person would ever give over money even to settle claims of the trustee knowing that the next day people would turn around and sue the person who had just turned the money over to the trustee?

MR. SHARMA: Certainly, absolutely right, especially in this case where you have literally over a thousand lawsuits seeking the recovery of fraudulent transfers of which many if not most will end up settling.

THE COURT: Fraudulent transfer actions brought by the trustee.

MR. SHARMA: Correct, your Honor.

THE COURT: All right, thank you. Mr. Beasley.

MR. BEASLEY: Your Honor, let me respond to several of the points that were made. First, the argument that we've heard time and time again, these are really fraudulent transfer claims, fraudulent conveyance claims. That's not correct. That's not what they say. I respectfully submit, please read the complaint. And Cumberland Oil teaches that you cannot relabel these claims the way the trustee wants to do.

Secondly, the Court asked about the first injunction, and whether or not the first appeal divested the Court of jurisdiction below. I submit you received no answer to that question from Mr. Sheehan.

Third, this complete red herring as to multiple actions. Here we have the opposite. We have one class action on behalf of 3,000 people instead of 3,000 independent claims. This is precisely the opposite of this red herring of multiple actions.

Next, the injunction. The injunction really was part of the final settlement, and there's no question about it, there's no way to get around it, and you've heard both Mr. Sheehan and SiPC argue that it's essential.

On the question of whether or not --

THE COURT: That seems to cut against your argument rather than for it, because in your original papers you argued

that the injunction should be vacated because it was unnecessary, and then after SiPC and the trustee came back and said that the negotiations for asking for the injunction was an important part of the settlement. You gave up that argument and you said you now realize that it is part of the settlement. But if it's part of the settlement, that's a pretty strong argument in favor of Judge Lifland's decision to impose the injunction in order to get $7.2 billion for the Madoff estate.

MR. BEASLEY: Your Honor, I respectfully submit it's exactly the opposite. The fact that the injunction is intertwined with the settlement is a strong reason to void the entire settlement, not just the injunctions which we submit are the minimum outcome that should result from this proceeding.

THE COURT: It's a question of whether, isn't it, Judge Lifland had the power to do it, whether he had the jurisdiction to do it or whether he was acting beyond his jurisdiction in a way simply to effectuate getting more money for the estate, right?

MR. BEASLEY: We have argued that repeatedly, and we've said that in effect the trustee from the very beginning of this proceeding was very clear, going all the way back two years, that the reason he was attempting to block our pursuit of the Picower claims was so he could use those claims in order to settle with the Picowers. They basically misappropriated our claims and use them as a bargaining chip. No Court has

ever sustained that. Courts have considered that, have rejected it.

THE COURT: But Mr. Beasley, to frame the issue, there are parts of your papers that argue that the injunction was an abuse of Judge Lifland's discretion because it was unnecessary. The $7.2 was recovered from the estate, it won't go back. And you argument now, not that it was an abuse of discretion, that it was unnecessary, you argue that you simply had no power to do it. You argue under Johns Mansville much as the bankruptcy judge might have liked to have gotten money for the estate he went too far in getting this money. You don't question based on your current argument that he did it in order to get that money for the estate and it was a necessary part of the settlement.

MR. BEASLEY: Well, what we're saying is that the fact that the injunction is improper ties in with all the arguments, the other arguments that we have said and we have always argued that Judge Lifland had no jurisdiction to enter the settlement or the injunction.

THE COURT: But it's an argument of lack of jurisdiction. It's not an argument that it was unnecessary or abuse of discretion as a necessary part to getting $7.2 billion.

MR. BEASLEY: Essentially we've alleged that it's illegal, your Honor, that it contravenes Johns Mansville and

Zale and all of other cases.

THE COURT: Lack of jurisdiction.

MR. BEASLEY: Another point your Honor focused on in our original discussion was about whether the claims are common to all the creditors. The test is not whether all the creditors have the same claim, the test is whether the creditors and the estate all have the same claim, and here the estate clearly hasn't suffered the harm, same harm as Fox. Judge McMahon made that very clear in her discussion. I referred to it earlier, and I refer the Court to page -- because I know time is short -- page 15 of Judge McMahon's opinion, which talks about the fact that it is not sufficient merely, the test isn't simply whether the claim is common through all the creditors, it has to be common to the corporation, that is BLMIS, and the creditors, citing Coke. And since these were not claims that BLMIS could have asserted against the defendants they are not common to the corporation and its creditors. So merely focusing on whether a claim is common to the creditors is not the complete test. It has to be common to the creditors and to the entity. And the estate's injury is not the same as that of the Fox class.

All the cases, we've cited a myriad of them, Higgins, 7 Seas, Cumberland Oil, Grant Partners, Johns Mansville itself, all talk about looking to the injury of Fox versus the injury to the estate, and as I've said, no has claimed that the estate

before or after the bankruptcy suffered the injuries that we are claiming for the Fox class.

THE COURT: Didn't the Court of Appeals say in St. Paul, that if it's a claim that is common to all of the creditors then it is a claim that should be brought by the trustee?

MR. BEASLEY: No, your Honor. It's not just common to the creditors. It has to be common to the creditors and the corporation. And I don't have St. Paul directly in front of me, but I do have Judge McMahon's opinion quoting from Coke, which is the parallel case. As I said that's at page 15 of her decision. All of the cases that I just reviewed, including Granite Partners, state that the estate has to suffer the same harm in order for that to apply. So we believe that Judge McMahon was correct in rejecting the argument in the JPMorgan case.

Now, the final, I guess almost the final point, I always hate to say the final point.

THE COURT: The penultimate.

MR. BEASLEY: I'm sorry?

THE COURT: Penultimate.

MR. BEASLEY: One of the last points. The government did not get involved in this matter until after the trustee reached an approximate $5 billion settlement with the Picowers. I think the trustee's papers in the Bankruptcy Court say that

happened around March or April, and the government did not get involved in later in the fall. So this settlement that we're talking about did not occur because of the government, it was, the original settlement, having no government involvement at all. We believe that the whole forfeiture business, which has now been raised was based on two mistakes. Number one, a mistaken view of the trustee's claims thinking that the trustee has a claim to $7 billion in fraudulent conveyances, where as Judge Rakoff pointed out the real claim is $250 million. The second mistaken assumption was that Fox did not have any valid claims based on the Bankruptcy Court's initial injunctions, and when the forfeiture thing came up I had a meeting with the government. I had several conversations with the government, and I understand from my discussions --

THE COURT: They were popular parties.

MR. BEASLEY: They were. And they, from those discussions it was clear that they believed that the Fox claims had been extinguished by the first decision of the Bankruptcy Court, and if this Court held that those claims were not property of the estate and the Fox claims could go forward, then the forfeiture will be revisited. The amount and the allocation of the forfeiture will be revisited and I respectfully submit that this is the occasion for this Court to --

THE COURT: That's really not part of the record,

right? There's a --

MR. BEASLEY: No, sir, and neither was Mr. Sheehan's comments about his discussions with the government, which is what I'm really responding to.

THE COURT: Okay.

MR. BEASLEY: But the broader point, which doesn't depend on these discussions is that if in fact the Fox claims do not belong to the estate, it will have a major impact on other parts of this process.

Now --

THE COURT: Well, doesn't that support the trustee's argument? That seems to be an argument that reversal would be disruptive of the bankruptcy proceeding.

MR. BEASLEY: Well, it will be a different thing in the bankruptcy proceeding because the $7 billion that is now allocated to the trustee would not be there. Now, let me hasten to point out, if the Court rules as we request --

THE COURT: That would be substantially disruptive.

MR. BEASLEY: The trustees can go to the Picowers tomorrow and settle with them. There's no provision, we can't prevent the trustee from settling with the Picowers. What we're complaining about is the two-year stay that they have gotten against us which allowed this settlement, even though the appeal from the first order of the Bankruptcy Court was pending, which is harmful error, and we are complaining about

the fact that since they have made it clear that the injunction is an integral part of the settlement, that if you reverse the injunction the settlement should be reversed as well. But that doesn't mean that they can't settle tomorrow as long as they don't use a misappropriation of Fox's claim as a bargaining chip to obtain a settlement to which they are not otherwise entitled. And I think that argument that was made by the SiPC counsel made that extremely clear.

And the last thing, your Honor, and this really is the last thing, there's a quote from Zale, which was cited approvingly in Johns Mansville. When creditors have been improperly enjoined by a settlement, it is appropriate to reverse the approval order and vacate the entire settlement. That's Zale at 65, 765, 766, and your Honor, we submit that that is what should happen here. We respectfully request the Court to reverse the order.

THE COURT: Thank you. Ms. Chaitman.

MS. CHAITMAN: Your Honor, I would advocate what I think is a middle ground, which is simply that the injunction be vacated without touching the settlement itself, and I think that we have to be very clear about what the facts are. The facts are that $7.2 billion was irrevocably forfeited to the United States government. The facts are that the settlement agreement that the trustee entered into with the Picower defendants does not condition the settlement upon entry of the

injunction by the Bankruptcy Court. That was a totally gratuitous injunction.

THE COURT: Well, not totally gratuitous. I mean, a settlement agreement at the very least required that the trustee ask the Bankruptcy Court to enter the injunction, right?

MS. CHAITMAN: That's correct. I'm speaking from the Bankruptcy Court's perspective. From the Court's perspective, it was totally gratuitous. It was not necessary for the benefit of the estate, it was not necessary for the recovery of the --

THE COURT: But what do you do with the colloquy that I had with Mr. Sharma? You say it's gratuitous. There's the issue of jurisdiction, power to issue the injunction against third party claims. But in terms of a proper exercise of discretion, what defendant in a suit by a trustee would ever settle, given a substantial amount of money under circumstances where that defendant would continue to be open? There's the issue, there's the Johns Mansville issue about whether the Court had the power to do it, but in terms of exercise of discretion in the course of administering the estate, how do you respond it's not an abuse of discretion?

The issue has to be did the Bankruptcy Court have the power, not could the Bankruptcy Court take the $7.2 billion and say thank you very much and I don't think the injunction is

really necessary. The Bankruptcy Court has to sit over continuing settlements.

MS. CHAITMAN: And you know, your Honor, most often the settlements do not include an injunction, so that the settling parties have to face the liability that they have to other parties.

THE COURT: In Dreier there was such an injunction on appeal, right?

MS. CHAITMAN: Well, in the second Dreier decision the Court recognized that it couldn't enjoin third party claimants.

THE COURT: It can't enjoin independent claims, but there is an injunction in Dreier that's up on appeal now, isn't there?

MS. CHAITMAN: Right, but they didn't enjoin what you are calling independent claims and what I would consider our claims to be.

THE COURT: That comes back to the issue of whether they are independent or not.

MS. CHAITMAN: But again, if you want to --

THE COURT: The injunction plainly excepts independent claims.

MS. CHAITMAN: But if you define independent as not derived from the same facts. But I think that both on a jurisdictional basis and on a discretionary basis --

THE COURT: Your claims are plainly derived from the

same facts, right?

MS. CHAITMAN: They're derived from Mr. Picower's theft of the investors' money.

THE COURT: They're derived from the same facts as the trustee's claim. They're both derived from the same facts?

MS. CHAITMAN: I wouldn't say so, your Honor. I wouldn't say so at all. Because what the trustee recovered from Mr. Picower was, and what they say in their papers they recovered was the amount of money Mr. Picower took out in excess of what he put in. That's totally different from the claims that have been asserted by Mr. Beasley's client and by my client. We are not seeking the excess of what Mr. Picower took out over what he put in. We're seeking damages for his criminal conduct.

THE COURT: The damages differ, but the facts are the same as alleged by the trustee.

MS. CHAITMAN: Your Honor, you have to --

THE COURT: But that's right, isn't it? Yes?

MS. CHAITMAN: I think we have to distinguish something --

THE COURT: It's yes? Yes, but; but it's yes?

MS. CHAITMAN: Yes.

THE COURT: Okay.

MS. CHAITMAN: Because we had no access to Mr. Picower's documents. The trustee did, and those were the

trustee's allegations.

But let's be very clear about something. The trustee recovered not based on theft because he didn't -- the trustee has filed 988 fraudulent transfer actions against totally innocent investors who had no knowledge of the fraud, they received ordinary returns, nothing extraordinary. The allegations made against Picower were truly extraordinary, that that Picower was a co-conspirator of Mr. Madoff. The recovery that the trustee got is nothing more than the same recovery he sought against all the independent investors. So even though he alleged in his complaint that Picower was a mastermind and co-conspirator of the fraud, he didn't get a recovery based on that. He got a recovery based on his plain vanilla theory that anyone who took out more than they put in has to put it back, the same allegations he made against 988 groups of defendants in separate clawback actions.

So I think we can't get tied down on the allegations. The cause of action was totally different. We are seeking damages against the Picower entities for Jeffrey Picower's criminal conspiracy with Mr. Madoff. We're not seeking the amount of money he took out in excess of what he put in. So I think that the discretion and the jurisdiction go together and I think you have to look at them both, because there was no basis for the Bankruptcy Court to enjoin prosecution of litigation against non-debtors against the Picower entities

when the trustee has given them a complete release. It makes absolutely no difference to the trustee whether the Picower defendants have to cough up more of their ill-gotten gains. It wasn't in the trustee's claim.

THE COURT: All right.

MS. CHAITMAN: Thank you, your Honor.

THE COURT: Thank you, Ms. Chaitman.

MR. SHEEHAN: Your Honor, could I have 30 seconds?

THE COURT: If you have 30 seconds, I will give the appellants 30 seconds to respond to your 30 seconds.

MR. SHEEHAN: Thank you, your Honor. Not responding at all. It's just a continuation of what I always say about this case. Nothing in this case is easy. As I was going to sidebar, counsel for the Picowers are here, and they disagree with the fact that the $5 billion will come back and therefore if your Honor were to find, we'd probably have litigation over what that settlement agreement means. In other words, my view of it, Ms. Chaitman's, may not be the same as the Picowers, so nothing is easy, your Honor. That's all I wanted to add.

THE COURT: Anyone wants to respond to that?

MR. BEASLEY: May I have my 30 seconds, your Honor?

THE COURT: Sure.

MR. BEASLEY: Common facts are not the proper test. Johns Mansville says that, 7C says that. The issue is what damages were suffered. The damages suffered by the Fox class

are not in any way, shape, form or fashion the damages suffered by BLMIS or the trustee. Thank you.

THE COURT: Thank you. Ms. Chaitman?

MS. CHAITMAN: I'll cede my 30 seconds.

THE COURT: I very much appreciate the arguments, I very much appreciate the briefs and I'll take the appeals under advisement.

COUNSEL: Thank you, your Honor.

(Adjourned)